No. 87-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CABLEVISION COMPANY,
Petitioner,
v.
MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*, UNITED STATES COPYRIGHT OFFICE AND ITS REGISTER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's interpretation of 17 U.S.C. § 111(d)(1)(B) on the grounds that it disregards a critical part of the statutory language, and would allow cable systems to frustrate the purpose of the statute.

RULE 28.1 LISTING

The following are parents, subsidiaries (except wholly-owned subsidiaries) or affiliates of respondents Motion Picture Association of America, Inc.; Columbia Pictures Industries, Inc.; Embassy Communications; MGM/UA Communications Co.; Orion Pictures Corporation; Paramount Pictures Corporation; Turner Entertainment Company; Twentieth Century-Fox Film Corporation; Universal Pictures, a Division of Universal City Studios, Inc.; and Warner Bros. Inc.:

Chris-Craft Industries, Inc.
The Coca-Cola Company
Fox Television Stations, Inc.
Gulf & Western
MCA, Inc.
The News Corporation Limited
Turner Broadcasting System, Inc.
Warner Communications, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

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STATEMENT OF THE CASE

A. The Statutory Scheme

The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (1982 & Supp. IV 1986), grants cable systems the privilege of a compulsory license to retransmit copyrighted broadcast programming, 17 U.S.C.

§ 111(c), upon timely semi-annual deposit with the Copyright Office of a statement of account and royalty fee, 17 U.S.C. § 111(d)(1).[1] Failure to make the required deposits renders a cable system liable for copyright infringement. 17 U.S.C. § 111(c)(2). The royalty fees plus interest are later distributed by the Copyright Royalty Tribunal to copyright owners pursuant to §§ 111(d)(3) and (4).

Royalty fees are "computed on the basis of specified percentages of the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters . . . ." 17 U.S.C. § 111(d)(1)(B). For the largest cable systems, such as petitioner, the "specified percentages" are based on the "distant signal equivalent" ("DSE") values of the television stations retransmitted by the systems. *Id.*; *see* Pet. App. 8a-9a. The DSEs measure the amount of distant non-network programming retransmitted. Congress determined that the cable retransmission of such programming "causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed," H.R. Rep. No. 1476, 94th Cong., 2d Sess. 90 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659.

The focus of this litigation is on the "gross receipts" part of the calculation; the issue is the proper

[1] Congress amended 17 U.S.C. § 111(d) in 1986, by eliminating the original § 111(d)(1) and redesignating the remaining subsections. Pub. L. No. 99-397, § 2(a)(4), (5), 100 Stat. 848 (1986). Petitioner continues to use the pre-1986 language in its Petition; and, therefore, what is now § 111(d)(1) appears as § 111(d)(2) at pages 63a-65a of the Appendix to the Petition (hereinafter "Pet. App."). Respondents are using the current statutory designations.

interpretation of the statutory language "gross receipts . . . for the basic service of providing secondary transmissions of primary broadcast transmitters."

B. The Copyright Office Rulemaking Proceedings

On June 27, 1978, pursuant to its general authority to issue regulations under 17 U.S.C. § 702 and its specific authority under 17 U.S.C. § 111(d)(1) to issue regulations governing the payment of royalty fees, the Copyright Office adopted a regulation defining "gross receipts" as "the full amount of monthly (or other periodic) service fees for television and radio retransmission service, additional set fees, and converter fees." 43 Fed. Reg. 27,827, 27,832 (1978). The Office also adopted standardized statement-of-account forms to be used by cable operators in their semi-annual filings. *Id.* at 27,827. The instructions on the forms require cable systems to identify separately all categories of secondary transmission service, which form the basis of "gross receipts." Court of Appeals Appendix (hereinafter "C.A. App.") 444, 449; *see also* 43 Fed. Reg. at 27,833 (37 C.F.R. § 201.17(e)(6), (7) (1978)). In addition, the Office determined that, where cable systems bundle broadcast retransmission services and local origination services for a single monthly fee, they cannot "allocate" a portion of the fee to the local origination services and exclude that portion from "gross receipts." 43 Fed. Reg. at 27,828. The origination and retransmission services are "clearly part of an integral package offered to subscribers," and there is "no statutory justification or basis for allocating the monthly fee." *Id.*

In 1980, cable operators asked the Copyright Office to revise its definition of "gross receipts" in light of new marketing strategies and technological advances. 45 Fed. Reg. 45,270, 45,273 (1980). Accordingly, the Office commenced further rulemaking proceedings to consider, among other things, whether a cable system that carries distant television stations on one or more tiers that not all subscribers receive must include "any, all, or part of the tiered service gross receipts as part of its 'basic service' gross receipts." 46 Fed. Reg. 30,649, 30,651 (1981); *see also* Pet. App. 13a.

On July 28, 1981, the Office held a public hearing on the rulemaking. *See* 49 Fed. Reg. 13,029, 13,034 (1984). In its prepared testimony, the National Cable Television Association ("NCTA"), the cable television trade association, recognized that "gross receipts" are not limited to receipts from a cable system's lowest tier. C.A. App. 334; *see* 49 Fed. Reg. at 13,034-35. Petitioner Cablevision Company ("Cablevision") did not appear at the hearing and did not submit comments proposing that its interpretation of "gross receipts" be adopted.

The final regulation adopted by the Copyright Office in 1984 reaffirmed that "gross receipts" include "the full amount of monthly (or other periodic) service fees for any and all services or tiers of service which include one or more secondary transmissions of television or radio broadcast signals." 49 Fed. Reg. at 13,037 (37 C.F.R. § 201.17(b)(1)(1984)). The Office explained:

> [T]he Copyright Act does not permit any proration or other allocation of either DSE's or gross receipts by subscriber groups where any

> secondary transmission service is combined with nonbroadcast services in program packages, clusters, or tiers. We confirm in regulations the interpretation of the Copyright Act applied by the Licensing Division of the Office since 1978.

49 Fed. Reg. at 13,035. The Office noted that "[t]o a large extent . . . a cable system can control its own 'tiering' destiny . . . [by] offer[ing] secondary transmission services solely as part of minimum service or on discrete tiers, excluding expensive origination services in either case." *Id.*

C. Proceedings Below

Prior to May 1979, Cablevision marketed, for $7.00 per month, a 28-channel tier ("Family Cable"), which included all local and distant broadcast signals and all basic nonbroadcast programming. C.A. App. 572-73. In May 1979, Cablevision split this tier into two separate tiers. It placed 19 of the 28 channels, including all local broadcast signals, in a "first" or "lowest" tier, priced it at $4.50 per month, and called it "Basic Service." *Id.* 573. It bundled the remaining nine channels, including all distant broadcast signals, in a separate tier (which retained the name "Family Cable"), and priced it separately at $5.00 per month. *Id.* 573-75. The price for the 28 channels was, thus, increased from $7.00 to $9.50. Approximately 97-98% of Cablevision's subscribers purchased both tiers. *Id.* 574. Since 1979, the price for the first tier has remained $4.50, while the price for the second tier has been increased. *Id.* 573-74.

In its royalty-fee filings through the first half of 1979, Cablevision reported all subscriber revenues from its 28-channel service as "gross receipts." *Id.* 572. Thereafter, it reported as "gross receipts" only

the revenues from its 19-channel tier, *id.* 575-76, but in calculating royalty fees it used the DSE values applicable to the 9-channel tier. The result was a substantial drop in "gross receipts" and royalty fees, even as Cablevision's revenues from subscribers for the same group of 28 channels were increasing. *Id.* 695. Cablevision did not disclose its interpretation of "gross receipts" in its filings with the Copyright Office, and indeed concealed its reliance on that interpretation.[2] Cablevision has conceded that it is not aware of any other cable system that has used its method of computing "gross receipts." *Id.* 540-41.[3]

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[2] The statement-of-account form requires in Space E disclosure of subscriber and rate information for "all categories of 'secondary transmission service' . . . : that is, the retransmission of television . . . broadcasts by your system to subscribers." Information about services that do not include any secondary transmissions is to be included in Space F. C.A. App. 431. After May 1979, Cablevision reported only information for its first tier in Space E; and it reported information for its higher-priced tier—which included all of its distant-signal broadcast retransmissions—in Space F, even though, under the instructions for the form, that information belonged in Space E. *Id.* 444, 576. Cablevision thus concealed its retransmission and reporting practices. In later years, Cablevision's overall royalty payments increased for the reasons discussed at pages 17-18, *infra*.

[3] In the Copyright Office rulemaking proceedings, fifty-six cable systems proposed that "gross receipts" be interpreted to include only revenues from "basic service," which they described as "the service available to all cable television subscribers and which includes the local television channels *and most or all of the distant television stations offered.*" C.A. App. 422 (emphasis added). By contrast, beginning in May 1979 Cablevision's "Basic Service" tier included *none* of the distant signals Cablevision offered; all such signals were placed on a higher tier. *Id.* 574-75.

Respondents eventually learned of these practices and asked Cablevision to amend its past statements of account and pay additional royalty fees owed. Cablevision then sued respondents for a declaratory judgment that "gross receipts" under § 111(d)(1)(B) include only receipts from a cable system's "lowest" tier of service. Respondents filed counterclaims for copyright infringement.

Both the district court and the court of appeals squarely rejected Cablevision's interpretation of "gross receipts." The district court held that all tiers of service that contain broadcast signals must be included in the calculation of "gross receipts." Pet. App. 53a. Similarly, the court of appeals unanimously concluded that Cablevision's interpretation is "untenable." *Id.* 29a.[4]

REASONS FOR DENYING THE WRIT

Cablevision has not demonstrated any basis for review by this Court. Both the district court and the court of appeals correctly concluded that Cablevision's proposed interpretation is untenable. That interpretation, which has not been employed by any other cable operator in the United States, is inconsistent with the language of § 111 and would frustrate its underlying purpose. This case does not raise any broad issues worthy of the Court's attention.

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[4] Respondents' counterclaims are pending in the district court. That court originally dismissed the counterclaims, Pet. App. 55a, but the court of appeals reversed the dismissal and remanded for further proceedings, *id.* 4a.

1. The court of appeals's rejection of Cablevision's interpretation does not raise the questions presented in the Petition.

Cablevision's entire Petition is based on the erroneous premise that its interpretation of "gross receipts" was rejected by the court of appeals only "through the exercise of deference to the Copyright Office," Pet. 25. In fact, although the court concluded that the Office's interpretation was entitled to deference, the court made it clear that it was *not* relying on deference as a basis for rejecting Cablevision's interpretation:

> Even where two equally tenable interpretations of a statute are put forward, one by the agency charged with administering the Act—as we have held the Copyright Office to be—and the other by a private party, we will favor the former. *See Udall* v. *Tallman*, 380 U.S. 1, 4 (1965). *But on examination we find Cablevision's position untenable*, since it could lead to the absurdity of only a miniscule portion of revenues, at the option of a cable company, being included in gross receipts—hardly a reasonable interpretation of Congress' objective.

Pet. App. 29a-30a (footnote omitted; emphasis added); *see also id.* 4a. Similarly, the district court rejected Cablevision's interpretation on the ground that it "would *subvert Congress' express intention* of providing compensation to copyright owners of retransmitted distant signals." *Id.* 53a (emphasis added).

Thus, the questions concerning deference raised by Cablevision are not presented by the rejection of its interpretation by the courts below. Answering Cablevision's questions presented (Pet. i) in the negative,

as Cablevision contends they should be answered, would not affect the conclusion of either court below that Cablevision's interpretation is untenable.

2. The courts below were correct in rejecting Cablevision's interpretation.

As the court of appeals noted, under Cablevision's interpretation "the first tier—basic service in its parlance—may contain anything the cable system chooses." Pet. App. 29a. The first tier need not contain any broadcast retransmissions. *Id.* 22a. Under Cablevision's interpretation, "gross receipts" need not include *any* revenues related to a cable system's broadcast retransmission service.

To allow a cable operator to reduce its royalty-fee payments in this manner would frustrate a fundamental purpose of § 111: to compensate copyright owners for the retransmission by cable systems of distant non-network broadcast signals. *See* H.R. Rep. No. 1476 at 90; Pet. App. 6a-7a, 53a-54a. Cablevision's approach allowed it to make royalty-fee payments bearing no relation to its revenues from the service providing the very retransmission activity that Congress concluded required compensation to copyright owners. The courts below were unquestionably correct in rejecting an interpretation of "gross receipts" that produced a result so directly contrary to Congress's intent.

As the court of appeals explained, Cablevision's interpretation also ignores a critical part of the relevant statutory language. Under Cablevision's interpretation of "basic service," the phrase "of providing secondary transmissions of primary broadcast transmitters" is effectively read out of the statute:

> Indeed, since Cablevision contends basic service can contain anything the cable system chooses, and not necessarily just—or even any—broadcast retransmissions, *see infra* p. 29 [Pet. App. 29a], the phrase "of providing secondary transmissions of primary broadcast transmitters," which would seem to serve the purpose in the statute of explaining "basic service," could actually *contradict* "basic service."

Pet. App. 22a (emphasis in original).

3. The Copyright Office's interpretation of section 111 is entitled to deference.

The questions concerning deference that Cablevision raises do not warrant review. Ample precedent establishes that interpretations by the Copyright Office are entitled to deference. In both *Goldstein* v. *California*, 412 U.S. 546, 567-69 (1973), and *Mazer* v. *Stein*, 347 U.S. 201, 213 (1954), this Court deferred to the Office's construction of the law. Similarly, in *DeSylva* v. *Ballentine*, 351 U.S. 570, 577-78 (1956), the Court made clear that it would have accorded deference to the Office's position but for the fact that the Office had not made a "confident interpretation" of the statute.[5] Numerous lower court decisions have also accorded deference where the Office's interpretation of the law addressed the issue before the court.[6] In light of these authorities, the

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[5] The Court emphasized that it "would ordinarily give weight to the interpretation of an ambiguous statute by the agency charged with its administration, *cf. Mazer* v. *Stein*, 347 U.S. 201, 211-13." 351 U.S. at 577-78.

[6] *See Norris Industries, Inc.* v. *ITT*, 696 F.2d 918, 922 (11th Cir.), *reh. den.*, 703 F.2d 582, *cert. denied*, 464 U.S. 818 (1983); *Schnapper* v. *Foley*, 667 F.2d 102, 110 (D.C. Cir.

court of appeals would have been justified in flatly rejecting the suggestion that the Copyright Office's interpretations are not entitled to deference.

But the court carefully confined its analysis to the statutory provision at issue, and emphasized that its conclusion concerning the deference due the Copyright Office "does not extend beyond the bounds of [the Office's] interpretation of section 111 . . . ." Pet. App. 18a. The court also noted that deference to the Office would serve to discourage excessive litigation concerning § 111, which could defeat Congress's intent to effectuate the licensing of copyrighted programming without burdensome transaction costs. *Id.* 18a-19a; *see* H.R. Rep. No. 1476 at 89.[7]

1981), *cert. denied*, 455 U.S. 948 (1982); *Esquire, Inc.* v. *Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 297-98 (4th Cir. 1978); *Hoffenberg* v. *Kaminstein*, 396 F.2d 684, 685 (D.C. Cir.) (*per curiam*), *cert. denied*, 393 U.S. 913 (1968).

Cablevision's attempt to distinguish *Mazer, Norris, Schnapper, Esquire,* and *Eltra* as involving "copyrightability," Pet. 13 n.7, cannot withstand scrutiny. In each case, the question of copyrightability turned on the proper interpretation of the copyright laws. There is no principled basis for limiting deference to the Copyright Office's legal interpretations to the area of copyrightability. Moreover, *DeSylva* did not involve an issue of copyrightability, but rather the question of who was entitled to renew a copyright after an author's death. Finally, Cablevision is incorrect when it asserts that in each of the decisions it cites the court noted that "Congress had approved and ratified the Office's position when it revised the copyright laws in 1976." *Id. Mazer* was decided in 1954, long before the revision of the copyright laws in 1976.

[7] *See also* Pet. App. 17a ("Given Congress' awareness of the rapid changes taking place in the cable industry, we cannot believe that Congress intended that there be no administrative

The decision below does not conflict with *DeSylva* v. *Ballentine* or *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975). The court of appeals carefully considered the contention that the Copyright Office had reached "the point of excessive diffidence identified in *DeSylva*," and concluded that it had not: "we conclude that the Office did see itself as having the authority to issue regulations and did make 'a confident interpretation of the statute.' *DeSylva*, 351 U.S. at 577." Pet. App. 20a. The fact-bound determination that in this instance the Copyright Office had confidently construed the statute plainly does not merit review by this Court, and, in any event, was correct. When it issued its final regulation in 1984, the Office expressly invoked its authority to interpret the statute. *See* 49 Fed. Reg. 13,029, 13,031 (1984).[8]

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overseer of this scheme."). Although deference to agency interpretations does not depend on "a finding of agency 'expertise,'" Pet. 18, *see Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984), the Copyright Office has had considerable experience in administering the compulsory license provisions of the Copyright Act of 1976, *see* Pet. App. 19a. The Office was also extensively involved in the legislative process leading to passage of that legislation, *see Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 159-61 (1985), and prepared a report for Congress concerning the history of legislative attempts to determine the copyright liability of cable television systems, *see* H.R. Rep. No. 1476 at 89.

[8] Cablevision errs (Pet. 8, 15) in interpreting a Copyright Office regulation as suggesting that the Office lacks power to issue legal opinions. The Office simply has chosen for prudential reasons not to "give *specific legal advice*" to members of the public. 37 C.F.R. § 201.2(a)(3) (1987) (emphasis added). The same regulation makes clear that "[i]n the ad-

Nor does the opinion below conflict with *Bartok*. First, in *Bartok* it was "unlikely . . . that the Register of Copyrights considered the situation" before the court. 523 F.2d at 947 n.10. The Register had merely adopted a form setting forth a general definition of "posthumous" work, without addressing the issue that later came before the court. *Id.* at 946. Here, the Copyright Office conducted rulemaking proceedings and adopted a regulation that directly addresses the disputed issues in this litigation. Second, as the court below noted, because the Second Circuit "held the interpretation put forward by the Office was inconsistent with legislative intent, . . . its statement on the deference due the Office would seem to be a dictum." Pet. App. 21a. Third, the court below did not take issue with the *Bartok* dictum. The court emphasized that even if that dictum were "generally sound," it should not be extended to § 111 (which was enacted after *Bartok* was decided) because "Congress saw a need for a continuing interpretation of section 111 and thereby gave the Copyright Office statutory authority to fill that role." *Id.* Clearly, no conflict meriting this Court's attention arises where a court declines to apply a dictum in a prior opinion to a different statutory provision.

Cablevision's argument that the Copyright Office's interpretation was not entitled to deference is also based on several erroneous or irrelevant premises. First, the fact that the Office does not initiate enforcement actions (Pet. 15, 16 n.11) is irrelevant to the question of deference. Numerous decisions of this Court and the courts of appeals according deference

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ministration of the Copyright Act in general, the Copyright Office interprets the Act." *Id.*

to the Office's views have not even considered it pertinent that the Office does not bring enforcement actions.[9] Second, the Copyright Office's description of the challenged regulation as "interpretive," 49 Fed. Reg. at 13,031, does not make deference inappropriate.[10] Third, contrary to what Cablevision suggests (Pet. 17-18), the final regulation issued in 1984 is fully consistent with the 1978 regulation.[11]

INS v. *Cardoza-Fonseca*, 107 S. Ct. 1207 (1987), does not establish that a court may freely substitute its view for that of an agency on "a pure question of statutory construction," Pet. 21. *Cardoza-Fonseca* merely reaffirms the first step of the *Chevron* test:

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[9] *See Goldstein* v. *California*, 412 U.S. at 568-69; *Mazer* v. *Stein*, 347 U.S. at 213; *Norris Industries, Inc.* v. *ITT*, 696 F.2d at 922; *Schnapper* v. *Foley*, 667 F.2d at 110; *Esquire, Inc.* v. *Ringer*, 591 F.2d at 801; *Eltra Corp.* v. *Ringer*, 579 F.2d at 297-98; *Hoffenberg* v. *Kaminstein*, 396 F.2d at 685. This Court has also deferred to the views of other agencies not empowered to commence enforcement actions. *See, e.g., Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (Council on Environmental Quality).

[10] *See, e.g., Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 106 S. Ct. 2860, 2868 (1986) (executive agreement with foreign country); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (FDIC's policy of excluding standby letters of credit from statutory provision governing deposits); *United States* v. *City of Fulton*, 475 U.S. 657, 666 (1986) (Department of Energy regulations interpreting the Flood Control Act); *United States* v. *Clark*, 454 U.S. 555, 565 (1982) (interpretive regulations promulgated by the Civil Service Commission); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-66 (1980) (Federal Reserve Board staff opinions); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (EEOC guidelines).

[11] See pages 3-5, *supra*.

if Congress's intent is clear, "that is the end of the matter," *Chevron*, 467 U.S. at 842; the question of deference does not arise. Any notion that the *Chevron* test is inapplicable to "pure questions of statutory construction" was laid to rest in *NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987).

4. The court of appeals did not hold that Congress's intent may be discarded as "outmoded."

The decision below does not "set[] the precedent that Congress' intent, once found, need not be effected if the court or an agency deems such intent to be outmoded," Pet. 22. Cablevision mischaracterizes the court of appeals's reasoning. The court did not conclude that Congress intended that "gross receipts" be limited to revenues collected from the "first tier of service," *id.* 21, and then discard that intent as "outmoded." The court stated:

> The legislative history shows that Congress contemplated only one "tier" containing a mixture of broadcast and cable-originated stations. All higher "tiers" in this model contained only cable-originated stations for a separate fee, and these pay cable services were excluded from gross receipts. *See* H.R. Rep. No. 94-1476, *supra*, at 96. Thus *the tier from which gross receipts were to be calculated was at the same time all tiers (the only one) containing a broadcast signal—the Copyright Office's view—and the first tier alone —Cablevision's position.*

Pet. App. 27a (emphasis added).

The court adopted the Copyright Office's interpretation over Cablevision's not because it considered § 111 "outmoded," but because (1) "[t]he Copyright

Office's regulation is . . . the interpretation before us that best accounts for the statutory language,"[12] *id.* 22a; (2) the regulation "evinces a full understanding of the structure and purpose that underlie that language," *id.;* and (3) Cablevision's interpretation "could lead to the absurdity of only a miniscule portion of revenues, at the option of a cable company, being included in gross receipts—hardly a reasonable interpretation of Congress' objective," *id.* 29a-30a (footnote omitted). Cablevision's attack on the court of appeals's opinion thus distorts the court's actual reasoning.[13]

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[12] It is ironic that Cablevision invokes the principle that "statutes are to be interpreted so that no word is rendered superfluous," Pet. 26 n.24. The court below relied on that very principle, Pet. App. 21a-22a, in ruling that Cablevision's interpretation is untenable. The court noted that under Cablevision's interpretation of "basic service," "all language that follows that term is superfluous." *Id.* 22a. See also pages 9-10, *supra.*

[13] The court of appeals did not "ignore[]" (Pet. 23) the materials presented by Cablevision in support of its interpretation of "gross receipts." The court carefully considered Cablevision's arguments and found them unpersuasive. Pet. App. 26a-30a.

Addressing petitioner's claim that its affidavits demonstrate that "basic service" equals first tier, the court found that "one can concede each step and not reach Cablevision's conclusion" because "Congress *never considered* the situation of multiple tiers containing broadcasting, and use of an industry definition from a period when the practice under consideration was not widespread in the industry is singularly unenlightening." *Id.* 27a-28a (emphasis in original; footnote omitted). (The affidavits also addressed the term "basic service" rather than the relevant statutory language, "basic service of providing secondary transmissions of primary broadcast transmitters,"

Cablevision is far off the mark in claiming, Pet. 27, that the decision below will result in "windfall payments" to copyright owners and "exorbitant cost" to cable operators. The increase in royalty fees since the compulsory license provisions became effective in 1978 is not due to the Copyright Office's interpretation of § 111(d)(1)(B) (which has remained the same throughout this period), but to the enormous growth in the number of cable subscribers and cable industry revenues, the FCC's repeal of its restrictions on carriage of distant signals by cable systems and the consequent royalty rate adjustment by the Copyright Royalty Tribunal, *see National Cable Television Association* v. *Copyright Royalty Tribunal*,

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and relied on concepts (such as tiers of service) not referred to in the statute.)

The court correctly rejected Cablevision's arguments based on FCC terms appearing in copyright revision bills that preceded the Copyright Act of 1976. *Id.* 28a-29a. The statutory term "basic service of providing secondary transmissions of primary broadcast transmitters" cannot be equated with the FCC terms such as "adequate service" that Cablevision cites. In particular, Cablevision's "concept of basic service is . . . simply unrelated to adequate service," *id.* 29a; Cablevision's view is that "the first tier—basic service in its parlance—may contain anything the cable system chooses," but adequate service "presumably involves a specific content," *id.* Moreover, although the term "adequate service" appeared in a number of early copyright revision bills, that term and its variants were deleted from the legislation that Congress enacted in 1976. In the enacted legislation, Congress discarded the provisions of prior bills creating a narrow compulsory license linked to "adequate service," and transformed the calculation of royalty fees by introducing the DSE values. As the court of appeals concluded, little significance can be attributed to an unenacted bill creating a compulsory license very different from the one Congress ultimately created. *Id.* 28a.

724 F.2d 176 (D.C. Cir. 1983), and statutorily authorized inflation adjustments.[14] Total revenues for the cable industry for 1987 have been estimated at $12 billion. *See New York Times*, April 17, 1988, § 3 at 1. Royalty fees for broadcast programming thus continue to represent less than 1% of revenues.[15] If Cablevision or other cable operators are dissatisfied with the current level of royalty payments, their remedy is in Congress, not in this Court.

Cablevision's reliance (Pet. 17-18 n.12) on *Bethlehem Steel Corp.* v. *EPA*, 723 F.2d 1303 (7th Cir. 1983), where the agency exceeded its statutory authority, *id.* at 1310, is misplaced. It is Cablevision's interpretation—which has been rejected by both par-

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[14] Congress empowered the Copyright Royalty Tribunal to adjust the royalty rates in 1980 and every five years thereafter, so as "to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act." 17 U.S.C. § 801(b)(2)(A). Adjustments were needed and made in 1980 and 1985 to take account of inflation. *See* 50 Fed. Reg. 18,480 (1985); 46 Fed. Reg. 892 (1981), *amended*, 47 Fed. Reg. 52,146 (1982). The fact that the royalty rates had to be adjusted to maintain "the real constant dollar level of the royalty fee per subscriber" is itself proof that copyright owners have not received "windfall payments."

[15] Cablevision's reference to copyright owners' request for interest on past underpayments, Pet. 28, is puzzling. Congress clearly contemplated that copyright owners would receive interest on royalty fees paid to the Copyright Office: §111(d)(2) expressly provides that royalty fees deposited with the Copyright Office "shall be invested in interest-bearing United States securities for later distribution with interest." The request that the Office require payment of interest by cable operators that have made underpayments merely seeks to effectuate Congress's intent.

ties to the 1976 compromise, MPAA and NCTA; by the Copyright Office; and by two courts—that would alter the industry compromise by allowing a cable operator to exclude from "gross receipts" all subscriber revenues from broadcast retransmissions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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